II.

The Standard for Identifying Obscenity Approved by the Court as Meeting Constitutional Objections Is Different From the Standard Under Which Appellant Stands Convicted. Appellant Thus Stands Convicted of a Charge Not Made.

The definition of obscenity approved by the Court as meeting constitutional standards is "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (S. O. 11.) Under California law material is obscene "if it has a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires." (*People v. Wepplo*, 78 Cal. App. 2d (Supp.) 956, 178 P. 2d 853.)

The Court cited *United States v. One Book Entitled Ulysses*, 72 F. 2d 105 (C. A. 2, 1943), as a case adopting the correct constitutional standard (S. O. 11, fn. 26) but California does "not consent to everything" there said. (*People v. Wepplo*, 78 Cal. App. 2d (Supp.) 956, 178 P. 2d 853, 856.) Nor does California accept "sincerity of purpose" or the opinion of "literary critics". "Literary merit" is also not a criterion. (*People v. Wepplo*, 78 Cal. App. 2d (Supp.) 959, 962-963, 178 P. 2d 853.)

Mr. Justice Harlan correctly noted that the Court's definition of obscenity was drawn from the American Law Institute's Model Penal Code, Tentative Draft No. 6[6] (Mr. Justice Harlan, S. O. 4). This Tentative Draft

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[6]Hereinafter referred to as Tentative Draft. It is at least of passing interest that this draft was first published May 6, 1957, after argument in this case. The draft was submitted by the Council to the members for discussion at the 34th annual meeting, May 22, 23, 24 and 25, 1957.

rejected the "prevailing test" for determining obscenity, which is the test adopted by California. The Tentative Draft pointed out that in the four following important respects the California test was different from and less satisfactory than the Tentative Draft's "prurient" formula:

1. Because "it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art." (Tentative Draft, 10.)

2. Because "regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." (Tentative Draft, 10.)

3. Because "if actual proof of tendency to corrupt were required, prosecutors would have a difficult task." (Tentative Draft, 10.) Indeed, prosecutors would have an impossible task because, as the Tentative Draft observes, it is virtually impossible to either prove or disprove that books have "a tendency to corrupt". (Tentative Draft, 21, 24, 25-27.)

4. Because it is couched in terms of psychiatric impact on hypothetical persons and "there is no phychiatric concensus, and second, because the legal test must be one reasonably within the power of ordinary citizens to understand, and of policemen and courts to apply." (Tentative Draft, 32.)

In light of the aforesaid we respectfully submit, that in derivation and in logic the two rules are importantly different and the Court erred in equating them.[7]

If then the Court's standard for determining obscenity within constitutional bounds is different from the one under which appellant was tried and convicted appellant was denied due process of law. (*De Jonge v. Oregon*, 299 U. S. 353; *Cole v. Arkansas*, 333 U. S. 196.)

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[7]The suggestion that the California definition of obscenity is the same as the Court's (S. O. 20, footnote 20) can stand only if it be conceded that neither definition is more than a mask and that obscenity is determined not by law but by instinct. (*See Commonwealth v. Gordon*, 66 D & D 101, 116 (Pa. 1949).) Dissenting in No. 107, Mr. Justice Brennan recognized the elusiveness of the new test by stating that in his view a jury was the only competent tribunal capable of separating obscene from constitutionally protected literature. It may be conceded that a jury can "legislate" more satisfactorily in this field than a judge. But when the real issue submitted to a jury is "legislative" not "judicial" a violation of the Fourteenth Amendment occurs. (*Cline v. Frink Dairy Co.*, 274 U. S. 445, 457.) Moreover, if the concept of obscenity is so elusive that a judge may not be trusted to make this determination properly, the standard is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to criminal penalties. (*Lanzetta v. New Jersey*, 306 U. S. 451.) Mr. Justice Harlan noted that there is no agreement among experts as to what effect, if any, "bad" books have on readers (S. O. 6-7). This "division of opinion" was thought to justify permitting the state to experiment with suppressing books dealing with sex. (Mr. Justice Harlan's opinion, 10-11.) If experts, however cannot determine what effect a book will have on its readers, how can a defendant know? Since the question of obscenity turns upon the book's effect on its readers, how can it be said that the Act gives adequate warning to those subject to its provisions as well as providing proper standards for adjudication? (*International Harvester Co. v. Kentucky*, 234 U. S. 216.) Nor can the vagueness issue be answered by saying that a person, not a book, is on trial. Appellant was not tried or convicted under such an interpretation of the Act [R. 7-8, 98]. If that were the interpretation of the statute it "would raise constitutional questions of a different order" (Mr. Justice Harlan, S. O. 13). Moreover, the intent required by California law is illusory as appears from the brief for the appellant, page 73, fn. 25.

There is another related reason for reversal here. The Court recognizing that "sex and obscenity are not synonymous" (S. O. 9) and the importance of confining the term "obscene" to protect "freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest" (S. O. 11), adopted the American Law Institute's formula which as we have shown was thought to be narrower than the California definition. Under the California test protected books may be found obscene although they could not, it was thought, under the Court's test. Since appellant may have been convicted for distributing constitutionally protected material the rule of *Stromberg v. California*, 283 U. S. 359, requires a reversal.

Finally it should be noted that in giving a different meaning to the state statute without reversing, the Court construed state law by direct action. This the Court may not do. (*Dennis v. United States*, 341 U. S. 494, 501-502.) The Court there observed that it had to reverse cases similar to *Thornhill*, *Herndon* and *De Jonge* because it could not give a state act an interpretation other than the one placed upon it by the state court, even when a narrower construction would save legislation otherwise offensive to the constitution.

III.

The Court's Opinion Does Not Treat or Consider the Serious Constitutional Question of Censorship Under an Unconfined Standard of "Obscenity" Whether Cast as "Tending to Corrupt or Deprave" or "Appealing to Prurient Interest".

The core of the argument presented by appellant to this Court was that the unconfined provisions of the California law vested in the State the arbitrary power to suppress speech. This central thesis was developed at length in the brief and was the fundamental ground for the attack upon the validity of the statute. (See App. Br. 74-107.) This Court has now adopted a new definition for obscenity, to wit: "whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (S. O. 11.) It is respectfully submitted that all the arguments that were made in the brief with respect to the California definition apply equally to the standard now enunciated by this Court. As a matter of fact, many of the historical examples to which we referred involved situations in which the attacks on the writings and persons were because of claims of pruriency. Mr. Justice Brennan dissenting in No. 107 himself recognized the essential vagueness of the new standard. His dissent as we have shown is bottomed on the premise that the new definition of obscenity was so elusive that a judge could not be trusted to separate obscene literature from constitutionally protected literature. In his view a jury was the only competent tribunal to make this determination. Perhaps a jury can censor "obscene" material more in keeping with the mood of the community than a judge but historically a great deal of

the censorship which is condemned by the First Amendment was often done with greatest popular support.

This Court in *Holmby Productions, Inc. v. Vaughn*, 350 U. S. 870 unanimously held the standard "obscene" to be an unconstitutional one creating censorship of speech. Can it be suggested now that the vice there recognized could be cured by the mere addition on the part of the State censoring board of a finding of "pruriency"?

We respectfully submit that the varying views of the Justices as expressed in the opinions deal with some of the symptoms of censorship without actually discussing or passing upon the constitutional vice of censorship itself. For example, Mr. Justice Harlan noted in his concurring and dissenting opinion:

> ". . . this statute as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech."

That is true of this case also. If "Lady Chatterley's Lover" is protected by the First Amendment against federal censorship it is equally protected by the Fourteenth Amendment against state suppression (*Winters v. New York*, 333 U. S. 507, 508) by "village tyrants." (*West Virginia State Board of Education v. Barnett*, 319 U. S. 624, 638.) It is no answer to say that no "overwhelming danger . . . is likely to result from the suppression of a borderline book in one of the states . . ." (Mr. Justice Harlan, S. O. 11.) This Court has always been vigilant to prevent the first small breach of the Constitution since the erosion of vital rights *always* commences with small "borderline" invasions.

In No. 107 Mr. Chief Justice Warren, dissenting said:

> "There is totally lacking any standard in the statute for judging the book in context . . . certainly in the absence of a prior judicial determination of illegal use, books, pictures and other objects of expression should not be destroyed. It savors too much of book burning."

In No. 107 Mr. Justice Frankfurter observes that "in its effective operation" there is more, not less, censorship here than in No. 107. (Mr. Justice Frankfurter, S. O. 6.)

On another occasion Mr. Justice Frankfurter joined the dissent in *United States v. Alpers*, 338 U. S. 680, where it was stated:

> "Censorship in any field [including 'publications or pictures found to be indecent, obscene, etc.] may . . . readily encroach on constitutionally protected liberties . . ." (P. 687.)

Again, Mr. Justice Burton showed an awareness of the threat of censorship, dissenting in *Donaldson v. Reed Magazines, Inc.*, 333 U. S. 178, 192.

Appellant respectfully submits that the important and significant constitutional question here presented should be passed on by this Court. Censorship in any form and under any guise, whether exercised by governmental bodies or by dominant majorities in the community sitting as a jury is a vice which the First Amendment forbids and which a democratic society cannot endure. It would be regrettable if a constitutional question of such broad scope, properly presented to this Court in a proceeding, should not be considered and determined by the

final tribunal of the land. The stifling effect of censorship is self-perpetuating, which partly explains the length of time it took to finally bring this issue before the Court. It is difficult to exaggerate the far reaching consequences to society if the Court fails to grapple with this crucial censorship question. Rather than face prosecution in a tribunal where the jury makes the law as it renders its verdict the hapless book dealer and book seller will discard what is constitutionally protected writings, art and literature, and avoid further litigation; yet at the same time society will be suffering from this censorship imposed under the standard of "pruriency". A matter of such societal consequence should not be passed *sub silento*.

Conclusion.

Rehearing should be granted and the judgment reversed. In the alternative, the case should be returned to the State Court for a specific determination of the material found to be obscene and for the State Court's interpretation of California Penal Code, Section 311, in the light of the Court's opinion.

Respectfully submitted,

STANLEY FLEISHMAN,

Attorney for Appellant.

WILLIAM B. MURRISH,

SAM ROSENWEIN,

Of Counsel.

Attorney's Certificate of Good Faith.

The undersigned Stanley Fleishman, attorney for appellant, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment the grounds of said petition are well taken and in conformance with the Court's Rules and that said petition for rehearing is not interposed for delay.

STANLEY FLEISHMAN,

Attorney for Appellant.